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No. 88-1324

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1988

JACK R. DUCKWORTH, Superintendent,
and INDIANA ATTORNEY GENERAL

Petitioners,

v.

McKINLEY DUDLEY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES
COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

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Dated: March 10, 1989

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Petitioners,

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Respondent.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Respondent McKinley Dudley, by his attorneys, respectfully request that this Court grant him leave to proceed in forma pauperis pursuant to Rule 46 of the Rules of the Supreme Court of the United States. In support of this motion, Mr. Dudley states:

1. Jack R. Duckworth and the Indiana Attorney General (the "State") brought this petition for writ of certiorari to obtain this Court's review of the Seventh Circuit's order directing the district court to grant Mr. Dudley's petition for writ of habeas corpus in the event the State fails to retry Mr. Dudley. Mr. Dudley seeks to file a response to the State's petition and to proceed in forma pauperis in the proceedings before this Court.

2. Mr. Dudley sought and obtained leave in the district court to proceed in forma pauperis pursuant to 28 U.S.C.§ 1915. On July 23, 1986, the district court entered an order stating that Mr. Dudley's "pauper status shall continue for the purposes of prosecuting this appeal." A

copy of the District Court's order is attached to this motion as Exhibit A.

3. After filing a pro se brief on his appeal before the Seventh Circuit, Mr. Dudley moved the Court for appointment of counsel. On March 27, 1987, the Seventh Circuit Court of Appeals granted Mr. Dudley's motion and appointed Jerold Solovy of the law firm of Jenner & Block to represent Mr. Dudley. The Seventh Circuit's order recites that the Court appointed Mr. Solovy pursuant to the provisions of the Criminal Justice Act. A copy of the Seventh Circuit's Order is attached as Exhibit B to this motion.

4. Pursuant to Rule 46 of the Supreme Court, Mr. Dudley's appointed counsel has prepared a Response to the State's Petition for Certiorari complying with the requirements of Rule 39 for typewritten documents filed with the Court. Counsel wishes to submit this Response without incurring the substantial additional expense of printing the brief.

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One of the Attorneys for
Respondent McKinley Dudley

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF INDIANA

SOUTH BEND DIVISION

86 JUL 23 P3:25

MCKINLEY DUDLEY

vs.

JACK R. DUCKWORTH, Warden

CAUSE NO. S85-0491

ORDER

Petitioner seeks to appeal this civil action without prepayment of fees and costs or security therefor, pursuant to Title 28, U.S.C. §1915. Because petitioner was granted leave to proceed in forma pauperis in the underlying civil action, and nothing having been proffered to this Court indicating a change in the petitioner's financial condition, petitioner's pauper status shall continue for the purposes of prosecuting this appeal. SO ORDERED.

Entered this 23rd day of July, 1986

Allen Sharp

CHIEF JUDGE, UNITED STATES DISTRICT COURT

cc: McKinley Dudley
David Steiner
USCA

EXHIBIT A

United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604

March 27, 1987.

Before

Hon. RICHARD D. CUDAHY, Circuit Judge

Hon. _____

Hon. _____

McKINLEY DUDLEY,
Petitioner-Appellant,

No. 86-2293 v.

JACK R. DUCKWORTH, Warden,
Respondent-Appellee.

Appeal from the United States District Court for the Northern District of Indiana, South Bend Division

No. 85 C 491
Hon. Allen Sharp,
Chief Judge

This matter comes before the court for its consideration of the "MOTION FOR APPOINTMENT OF COUNSEL", filed herein on October 7, 1986, by petitioner-appellant McKinley Dudley.

Upon consideration thereof

IT IS ORDERED that the Motion For Appointment of Counsel is GRANTED, and Mr. Jerold Solovy, Jenner and Block, One IBM Plaza, Chicago, Illinois, 60611, is hereby appointed pursuant to the provisions of the Criminal Justice Act to represent McKinley Dudley, the petitioner-appellant herein. Counsel is directed to contact the petitioner-appellant immediately.

IT IS FURTHER ORDERED that the following briefing schedule be adopted:

1. The petitioner-appellant shall file his supplemental brief and required short appendix on or before May 6, 1987.

2. The respondent-appellee shall file his brief on or before June 5, 1987.

3. The petitioner-appellant shall file his reply brief, if any, on or before June 19, 1987.

EXHIBIT B

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Petitioners,

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McKINLEY DUDLEY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES
COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION

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Dated: March 10, 1989

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October Term, 1988

JACK R. DUCKWORTH, Superintendent,
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Petitioners,

v.

McKINLEY DUDLEY,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION

Jack Duckworth and the Indiana Attorney General (the "State") have brought this petition for writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit directing the district court to grant McKinley Dudley's petition for writ of habeas corpus in the event the State does not retry Mr. Dudley within 120 days.

In its effort to present the kind of "special and important reasons" for issuance of the writ of certiorari required by Supreme Court Rule 17, however, the State has unfairly characterized the basis for the Seventh Circuit's decision and distorted the significance and impact of that decision on the administration of justice. Accordingly, respondent McKinley Dudley respectfully requests that this Court deny the State's petition for writ of certiorari.

STATEMENT OF THE CASE

I. The State Trial Court Proceedings Below.

On May 27, 1982, Kennis Butler and Rodney Phillips entered the Chesterton State Bank in Portage County, Indiana, with handguns and removed approximately $8,835.00. (R. 654, 763, 820, and 889-915.) Butler and Phillips subsequently fled from the Bank in a car driven by Edward Pointer. (R. 656-59.) Police pursued the car and, after an exchange of gunfire, the police stopped and apprehended Butler, Phillips, and Pointer. (R. 656-63 and 964-69.) Police found the amount of money that had been taken from the Bank ten minutes earlier on Butler. (R. 1094 and 1545-46.)

A. The Evidence Presented By The State Concerning Mr. Dudley.

The respondent McKinley Dudley was not tied to the robbery until Gerri Peters came to the police pound to claim the car used in the robbery. (R. 1562 and 1583-84.) Peters told police that Mr. Dudley and Cecil Lewis had used the car on the day of the robbery. (R. 1584.) When police questioned Lewis, he denied any knowledge of the robbery. (R.1588.) Only after Lewis was promised immunity from prosecution did he make any accusations against Mr. Dudley and acknowledge his own involvement in the robbery. (R. 1589.)

Mr. Dudley was charged with aiding a robbery and was tried in a joint trial with Butler and Phillips, both of whom were charged with robbery and criminal recklessness. The trial lasted over two weeks and involved over 30 witnesses and 125 State's exhibits. Only two of the State's 23 witnesses purported to directly implicate Mr. Dudley in the

robbery.[1] The testimony of these two witnesses conflicted on several important points.

Cecil Lewis, who had been immunized from prosecution, testified that it was his idea to rob the Bank and that he discussed his plans with Butler in the presence of Mr. Dudley on two occasions prior to the day of the robbery. (R. 1270 and R. 1273.) Lewis testified that when he first discussed the robbery in Mr. Dudley's presence, Mr. Dudley told him they were "crazy." (R.1273.) Lewis testified that Mr. Dudley did not participate in the second discussion about the robbery. (R.1273-74.) Lewis also testified that when he talked about the robbery, he did not think Mr. Dudley believed him. (R.1284.) Lewis further testified that he took guns from Mr. Dudley's home the night before the robbery, but that he never told Mr. Dudley why he wanted the guns.[2] (R. 1282.)

Edward Pointer, the second witness on whom the State relied for its case against Mr. Dudley, also agreed to testify on behalf of the State as part of a plea bargain. (R. 153-56.) Unlike Lewis, Pointer testified testified that Lewis, Butler, and "some other guy" (not Mr. Dudley) were involved in prior discussions concerning the bank robbery. (R. 629-32, 667-68.)

1/ The State also relied upon the testimony of Gerri Peters, the woman who told police that Mr. Dudley had borrowed from her the lead car used in the robbery. Peters also identified the guns used in the robbery as the same guns Mr. Dudley had showed her when they first met. (R. 1343-44 and 1361.) Peters acknowledged, however, that she had no knowledge of the robbery itself or Mr. Dudley's purported connection to the robbery. (R. 1345 and 1356.)

2/ Lewis was the only witness at Mr. Dudley's trial who testified that Mr. Dudley was involved in any prior discussions about the robbery. Butler did not testify. (R. 1776-77.)

The testimony of Lewis and Pointer also was hopelessly in conflict regarding events on the day of the robbery. For example, Lewis testified that Pointer asked Mr. Dudley at a lounge on the morning of the robbery to drive a second car to switch with after the robbery. (R. 1285-86.) Pointer, on the other hand, testified that that there was no discussion at the lounge about a "switch car" and that he learned only from Lewis that Mr. Dudley would drive the "switch car" for the robbery. (R. 646.)

Pointer testified at trial that on the way to the Bank, the two cars stopped at a Shell gas station. (R. 615.) Pointer testified that he told Mr. Dudley at the gas station to follow him in his car so that he could show Mr. Dudley where to park the "switch car." (R. 645.) Lewis, on the other hand, did not testify that the cars stopped at a gas station on the way to the bank. Although he was in the same car as Dudley, Lewis testified that he did not recall Pointer ever telling Mr. Dudley to follow him to the switch point. (R. 1288.)

Pointer testified that, after leaving the gas station, he showed Mr. Dudley where to park the "switch car." (R. 646.) Pointer testified that when Mr. Dudley did not park the car as instructed, the two cars drove onto a major highway where they stopped to see what was wrong. (R. 652.) According to Pointer, Butler got out of the lead car to talk with Dudley at this point. (R. 652.) Lewis, on the other hand, testified that Mr. Dudley and Butler both got out of their cars and started arguing on a side street near where they were supposed to wait. (R. 1288-89.) Lewis testified that when they finally arrived at the supposed switch point, Mr. Dudley left the scene and drove back to Gary, Indiana because he did not like the location. (R. 1292.)

Neither of Mr. Dudley's co-defendants mentioned Mr. Dudley in their statements to the police. (R. 1134-35 and 1579-80.) One of those co-defendants, Rodney Phillips, admitted at trial that he was involved in the robbery and that the only other persons he knew were involved were Butler, Pointer, and Lewis. (R. 1811-15 and 1835.)

B. Mr. Dudley's Testimony.

Mr. Dudley testified on his own behalf at trial. Mr. Dudley testified that he was not a party to any prior discussions concerning the robbery and he did not overhear any such discussions. (R. 1671-73 and 1684-86.) Mr. Dudley explained that he had loaned his car to Lewis on the night before the robbery. (R. 1687.) Mr. Dudley, who worked as an automobile mechanic (R. 1661), agreed to meet Lewis at a nearby lounge the following morning and to go and repair a friend's car that had broken down alongside the road while Lewis was using it. (R. 1684-85.)

Mr. Dudley testified that, on the following morning, he went to the lounge in Gerri Peters' car to meet Lewis and to proceed to the abandoned car. (R. 1689.) Butler and Phillips, who had accompanied Lewis to the lounge in Mr. Dudley's car, went into the lounge while Mr. Dudley and Lewis waited outside and discussed how much it would cost to fix the car. (R. 1691-92.) Mr. Dudley, Lewis and the other men then went out to look for the abandoned car. (R. 1693.)

Mr. Dudley testified that when the group arrived at the location where Lewis friend's car allegedly had broken down, the car was no longer there. (R. 1695.) Regina Aldridge, the person who owned the missing car, testified at trial that she had the car towed away shortly after Lewis told her that the car had broken down, but she

forgot to tell Lewis about it. (R. 1782-84.) After discovering that Ms. Aldridge's car was gone, Lewis directed Mr. Dudley to follow Pointer to another undisclosed location. (R. 1690-96.)

After Mr. Dudley followed Pointer to the new location, Lewis asked Mr. Dudley if he would let Butler and the other men use Peters' car for a robbery. (R. 1700-01.) Mr. Dudley refused and told Lewis that the car was Ms. Peters' and it could be traced through her to him. (R. 1701-06.) Mr. Dudley subsequently repeated to Butler during an argument at a gas station that they could not use Peters' car for the robbery. (R. 1704.) Butler finally agreed that he would not use Peters' car for the robbery and promised to return to Gary, Indiana. (R. 1707-08.) Mr. Dudley and Lewis, now in Mr. Dudley's own car, left the gas station and headed for Gary. (R. 1709.)

Mr. Dudley was convicted of aiding the robbery in October 1982. Mr. Dudley was sentenced to a term of 20 years for aiding the robbery and an additional term of 30 years for being a habitual offender. (R. 347.)

II. The Appellate Proceedings Below.

Mr. Dudley and his two co-defendants, Kennis Butler and Rodney Phillips, appealed their convictions to the Indiana Supreme Court on the basis of numerous errors committed during trial and sentencing. The Indiana Supreme Court affirmed the trial court and upheld the conviction and sentence of Mr. Dudley and his co-defendants. Dudley v. State, 480 N.E.2d 881 (Ind. 1985).

Mr. Dudley filed a pro se Petition for Writ of Habeas Corpus with the United State's District Court for the Northern District of Indiana shortly after the Indiana Supreme Court issued its decision. In his petition, Mr.

Dudley cited numerous errors which occurred at trial and sentencing which deprived him of his fifth and fourteenth amendment rights. On June 24, 1986, the district court denied Mr. Dudley's petition. The district court denied Mr. Dudley's motion for reconsideration on July 10, 1986.

Mr. Dudley filed a timely appeal of the district court's decision to the United States Court of Appeals for the Seventh Circuit. In his briefs before the Seventh Circuit, Mr. Dudley identified numerous errors of constitutional dimension that deprived him of a fair trial.[3/]

3/ Mr. Dudley's petition for writ of habeas corpus and appeal asserted numerous constitutional errors which the Seventh Circuit did not reach in its decision below. These errors include:

- the State violated Mr. Dudley's fifth and fourteenth amendment rights when the prosecutor twice elicited testimony regarding Mr. Dudley's post-arrest silence;
- the State violated Mr. Dudley's due process rights when it violated the trial court's discovery order and failed to produce evidence which could have been used to impeach two of the three witnesses who testified against Mr. Dudley;
- the State violated Mr. Dudley's due process rights when it violated the trial court's discovery order and failed to produce interview notes of one of Mr. Dudley's witnesses;
- the State violated Mr. Dudley's fourteenth amendment rights when it improperly introduced evidence of Mr. Dudley's alleged prior involvement in another crime at trial and evidence concerning a third felony conviction at Mr. Dudley's habitual offender hearing;
- the State violated Mr. Dudley's fourteenth amendment rights when the State led Mr. Dudley into the courtroom in full view of the jury in handcuffs;
- the State violated Mr. Dudley's fourteenth amendment rights when the State tried Mr. Dudley with two co-defendants against whom the evidence was overwhelming; and
- the State violated Mr. Dudley's due process rights when it failed to try Mr. Dudley within 70 days and failed to sentence Mr. Dudley within 30 days of conviction as required by the Indiana Criminal Rules.

After reviewing the entire record, the majority of the Seventh Circuit panel which heard his appeal concluded that Mr. Dudley was deprived of his fourteenth amendment right to a fair trial when the prosecutor solicited testimony from Edward Pointer that he had received telephone threats the night before testifying but failed to link any of those threats to Mr. Dudley. (A-9.)

The Court reversed and remanded with directions that the district court grant Mr. Dudley's petition for writ of habeas corpus in the event the State does not retry Mr. Dudley within 120 days. (A-10.) The State subsequently filed a petition for rehearing and suggestion for rehearing en banc. The Seventh Circuit denied the State's petition on November 7, 1988. (A-41-42.)

REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI

I.

The Seventh Circuit's Decision Is Consistent With Prior Decisions Of This Court And Other Circuit Courts.

The State argues, erroneously, that the Seventh Circuit's decision is inconsistent with prior decisions of this Court and other federal courts because the court of appeals "presum[ed] that Dudley was prejudiced as a matter of law" upon the admission of Pointer's testimony regarding telephone threats and applied the evidentiary standards of Indiana state appellate court decisions in assessing the impact of Pointer's testimony regarding the threats rather than the fundamental fairness standard properly applicable in habeas corpus proceedings. (Pet. at pp. 8-13.) The State's petition, however, unfairly characterizes the Seventh Circuit's decision and the record before this Court.

The court of appeals did not "presume" that testimony regarding threats to Pointer outweighed the

to the ultimate issue in the case of the fact sought to be proved by the threat evidence," "the sufficiency of the other evidence presented to make a reasonable connection between the defendant and the offense charged," and "the extent to which any possible inflaming of the jury can be cured by limiting instructions either at the time the testimony is tendered or when the case is submitted to the jury." 803 F.2d at 786. In the present case, each of these criteria clearly support the Seventh Circuit's decision.

The Seventh Circuit's decision in this case reflects the well-recognized principle that the introduction of threat evidence can be severely prejudicial and should be limited only to those situations "where there was a clear need for the prosecution to use such evidence." United States v. Check, 582 F.2d 668, 685 (2d Cir. 1978). The record in this case does not reflect any clear need for such testimony.

The State insists that such testimony was necessary to explain Pointer's nervousness on the witness stand, that the Indiana Supreme Court "factually determined" that Pointer was nervous on the witness stand, and that the majority "ignored" this finding in reaching its decision. (Pet. at p. 11.) The State's argument, however, misconstrues the Seventh Circuit's decision. While questioning the basis in the record for finding that Pointer was a particularly nervous witness, the court of appeals expressly assumed for purposes of weighing "the prejudicial effect of the testimony . . . against its necessity" that "Pointer's nervousness was extreme." (A-9.)

The Seventh Circuit's decision reflects the common sense principle that the introduction of testimony regarding threats to witnesses without connecting the threats to the defendant is highly prejudicial. United States v. Rios, 611

F.2d 1335, 1349 (10th Cir. 1979). This is particularly true in the present case where Mr. Dudley's defense depended so heavily on his own credibility. Far from departing from established legal principles, the Seventh Circuit's decision in this case properly applied those principles in finding that the prosecutor's solicitation of threat testimony under the particular circumstances of this case deprived Mr. Dudley his right to fundamental fairness at trial.

The State argues in its petition that a writ of certiorari is appropriate here because the Seventh Circuit's opinion purportedly applied an evidentiary standard borrowed from state law, and thereby conflicts with prior precedents which hold that questions concerning the admissibility of evidence should not be reversed on federal review unless the introduction of such evidence denies the defendant of fundamental fairness. (Pet. at pp. 9-11.)

The State's attempt to manufacture a conflict between the Seventh Circuit's opinion and prior decisions of other federal courts on this basis unfairly distorts the opinion. The court's opinion on its face acknowledges and applies the proper constitutional standard. The opinion expressly acknowledges that, while the admissibility of evidence is generally a matter left to state law, "[a] writ of habeas corpus should issue . . . when an erroneous evidentiary ruling 'is of such magnitude that the result is a denial of fundamental fairness.'" (A-5.)

In making that determination, the Seventh Circuit acknowledged that the court must assess "whether the probative value of the evidence outweighs the prejudice to the accused." (A-5.) The court also expressly distinguished its analysis from the principles of state evidentiary law when it concluded that, notwithstanding the decision of the Indiana Supreme Court denying Mr. Dudley's argument on appeal, "in reviewing

the denial of the petition for a writ of habeas corpus we must consider these issues in their constitutional context." (A-8.)

The Seventh Circuit's analysis clearly shows that the court properly applied these constitutional principles and did not base its decision on principles of state evidentiary law. The court's opinion itself makes this point expressly:

> We believe that more was at issue in the present case than a mere abuse of discretion as found by the state supreme court. This error appears to be of constitutionally significant proportions. When the prejudicial effect of the testimony is weighed against its necessity, even assuming the witness's nervousness was extreme, which seems to exaggerate the record, we find that the resulting prejudice mandates relief. We need not try to apply the 'grave peril' Indiana standard, however, because we find that the trial court's ruling allowing the trial court's record to stand 'is of such magnitude that the result is a denial of fundamental fairness.' The admission of this threat testimony could not help but deprive petitioner of his right to present an alibi defense to a jury free from 'evidential harpoons.' We find that the error amounts to a violation of the petitioner's fourteenth amendment right.

(A-9)(citations omitted).

Judge Coffey in dissent and the State on this petition make much of the fact that the court's opinion cites several Indiana court cases in the course of its discussion of Pointer's threat testimony. (A-19-20) (State Pet. at pp. 4-6.) The court's citation to these cases does not, however, evidence the application of the wrong standard of law. To the contrary, as the Indiana Appellate Court's decisions in Keyser v. State, 160 Ind. App. 566, 312 N.E.2d 922, 924 (1974), and Cox v. State, 422 N.E.2d 357, 360-63 (Ind. App. 1981), make clear, the introduction of threat testimony without linking that testimony to the defendant can be extremely prejudicial to a defendant, particularly in a case where, as here, the defendant's case rests upon his credibility. Determining the nature

and extent of this kind of prejudice is exactly the inquiry which the constitution requires. As the court of appeals' holding makes clear, the prejudice resulting from Pointer's threat testimony deprived Mr. Dudley his right to fundamental fairness in violation of the fourteenth amendment.

II.

The Seventh Circuit Properly Determined That the Erroneous Admission of Pointer's Threat Testimony Was Not Harmless Error.

The State argues that this Court should grant the writ of certiorari because, in making its determination that the introduction of Pointer's threat testimony was not harmless error, the Seventh Circuit purportedly invaded the province of the jury and "presumed" that the testimony of Pointer and Lewis should be discounted "merely because they were among Dudley's accomplices." (Pet. at pp. 13-17.) The State also insists that Mr. Dudley's alibi testimony should not be accorded any weight because, in the State's view, his testimony was "unbelievable" and the evidence against Mr. Dudley otherwise was overwhelming. (Pet. at pp. 16-17.)

The State's argument, however, again misconstrues the Seventh Circuit's decision and distorts the factual record. Furthermore, the State's attempt to argue the proper weight to be accorded particular evidence does not merit review on a petition for certiorari. The principle is well-established that this Court normally will not grant certiorari simply "to review evidence and discuss specific facts." United States v. Johnston, 268 U.S. 220, 227 (1925).

This Court has long recognized the principle that, under the harmless error standard of review, constitutional error is not harmless unless the State can establish beyond a reasonable doubt that the jury would have returned a verdict of guilty even absent the error. Chapman v.

California, 386 U.S. 18, 24 (1967). The fact that the evidence otherwise may be sufficient to support the conviction does not render the error harmless, particularly in cases where credibility of the witnesses is ~~a critical~~ issue. See Thompson v. Leeke, 756 F.2d 314, 316 (4th Cir. 1985).

Contrary to the State's argument, the Seventh Circuit's harmless error analysis was based on substantially more than the fact that Pointer and Lewis were Mr. Dudley's accomplices. The court of appeals specifically recognized that the evidence against Mr. Dudley was limited in nature and the only testimony purporting to link him directly to the crime came from witnesses who were given favorable treatment in exchange for their cooperation. (A-9.) The court also noted that the testimony of Pointer and Lewis was conflicting on several issues. (A-9.) Most importantly, the court noted that the introduction of Pointer's threat testimony irretrievably undermined Mr. Dudley's credibility and deprived him of any meaningful opportunity to present his defense to the jury. (A-9 and 10.) Measured by any objective standard, the evidence against Mr. Dudley was limited and inconsistent at best.

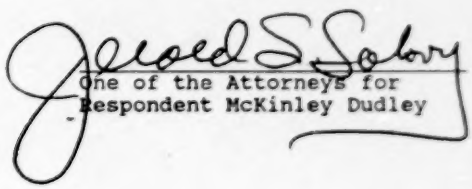
The State cites Judge Coffey's dissenting opinion in support of its assertion that Pointer's threat testimony was but one small incident in a lengthy trial. (Pet. at p. 15.) The vast majority of the lengthy trial to which the State refers, however, related directly to Mr. Dudley's co-defendants and did not relate in any way to Mr. Dudley. Of 23 State witnesses, only two purported to implicate Mr. Dudley directly in the robbery. In view of the fact that one of those two witnesses, Edward Pointer, also delivered the threat testimony, the State's attempt to minimize the significance of Pointer's testimony for this purpose is disingenuous.

The State also urges this Court to find that the trial court's error was harmless beyond a reasonable doubt because "Dudley's story was inherently unbelievable." (Pet. at p. 17.) The credibility of Mr. Dudley's alibi defense, however, is an issue which was fatally infected by the erroneous introduction of Pointer's threat testimony. The effect of Pointer's threat testimony cannot be disentangled on appeal from the jury's assessment of the credibility of Mr. Dudley at trial. In light of the limited amount of evidence presented against Mr. Dudley at trial, the Seventh Circuit properly found that the Mr. Dudley's defense was unfairly undermined by the introduction of Pointer's threat testimony.

CONCLUSION

For the reasons stated above, McKinley Dudley respectfully requests that this Court deny the State's petition for writ of certiorari.

Respectfully submitted,



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Dated: March 10, 1989

probative value of such testimony. Rather, the court carefully weighed the prejudicial effect of Pointer's testimony against the prosecutor's argument that such testimony was necessary to explain the witness's demeanor. The court of appeals noted, for example, that the issue of Pointer's nervousness did not come up until the prosecutor suggested it by asking Pointer "how do you feel about testifying here today?" -- an inquiry ordinarily of no relevance. (A-7.) The court also noted that Pointer initially stated in response to the prosecutor's inquiry that she was the one who had "upset" him earlier that morning, but that the prosecutor made no effort to have the witness explain that basis for his nervousness. (A-7.)

The transcript of Pointer's testimony reveals that the prosecutor pursued Pointer's explanation for his nervousness by asking him basically the same question four times (i.e. "Eddie, how do you feel about testifying here today?" "Why [don't you feel up to testifying]?" "Why don't you feel up to testifying here today?" and "What has happened to make you nervous, Eddie?"), and only the fourth time she obtained the desired response from Pointer about "some phone calls last night." (A-11 and 12.)

Not content with Pointer's reference to the phone calls, the prosecutor then introduced the possibility that Pointer might be "afraid" of testifying because of the phone calls. (A-12.) When Pointer answered yes, the prosecutor asked him "What are you afraid of?" twice until Mr. Dudley's counsel objected and moved for a mistrial. The court of appeals noted that once this testimony was out, the prosecutor exhibited no further concern whatever for Pointer's alleged nervousness. (A-7.)

Only after carefully reviewing the entire record, the court of appeals held that the prosecutor's solicitation

of Pointer's threat testimony denied Mr. Dudley's right to fundamental fairness under the particular circumstances of this trial because:

> 1) the prosecutor never linked any of the threats to Mr. Dudley or to any of his co-defendants, except by innuendo;
>
> 2) the trial record contains no independent basis to support the State's contention that Pointer's threat testimony was necessary to explain his demeanor, and in fact the record suggests "the strong possibility that the prosecutor intended to get the threat testimony before the jury under a pretext" (A-7);
>
> 3) Mr. Dudley testified at trial and his alibi defense rested upon his credibility which was destroyed unfairly by the "evidential harpoon" contained in Pointer's threat testimony (A-9); and
>
> 4) The trial court allowed the threat testimony to stand and gave no limiting instructions of any kind, notwithstanding the defendants' motion to strike the testimony and to admonish the jury. (A-9, A-13.)

Clearly, there was nothing automatic in the Seventh Circuit's weighing and consideration of these circumstances and its conclusion that Mr. Dudley was deprived of fundamental fairness as a result.

The State's argument for certiorari also fails because there is no inconsistency between the court of appeals' decision in this case and prior cases from this Court or other federal courts. The State relies on three cases initially cited by Judge Coffey in dissent to support the proposition that the majority deviated from the established principle that "evidence that a witness was threatened may have probative value and must be weighed against the actual prejudice suffered by the criminal defendant." (Pet. at p. 9, citing United States v. Peters, 791 F.2d 1270 (7th Cir. 1986); United States v. Guerrero, 803 F.2d 783 (3d Cir. 1986); and United States v. Qamar, 671 F.2d 732 (2d Cir. 1982). Contrary to the State's argument, however, there is no inconsistency between the Seventh Circuit's decision in

this case and the principles addressed in the decisions cited by the State.

In United States v. Peters, 791 F.2d 1270, 1291 (7th Cir. 1986), for example, the court held that the trial court did not abuse its discretion in admitting testimony concerning the defendant's threat to a witness and a tape recording of another threat delivered by the defendant to a government informant. 791 F.2d at 1291. The court upheld the district court's admission of this evidence on the basis that it was relevant to establish the defendant's supervisory role in an on-going criminal enterprise. Id. Peters is no authority for the admission of Pointer's threat testimony in the present case. Unlike the situation in Peters, there was no link between Mr. Dudley and the threat. Furthermore, unlike Peters, Pointer's threat testimony has absolutely no relationship to the underlying crime for which Mr. Dudley was being tried.

In United States v. Guerrero, 803 F.2d 783, 786 (3rd Cir. 1986), another case cited by the State, the Third Circuit found that the trial court did not abuse its discretion in admitting testimony regarding the defendant's efforts to intimidate a co-conspirator from testifying against him. Again, however, unlike the present case, the threat evidence at issue in Guerrero was clearly linked to the defendant. Furthermore, the content of the threat in Guerrero was "more than a merely menacing, yet irrelevant and unconnected, statement on Guerrero's part" and instead clearly evidenced the defendant's consciousness of guilt. Id. at 786.

In the present case, the threat was not connected in any way to Mr. Dudley, the content of the threat is not at all clear, and the State has no basis whatever on which to even suggest that the threat was evidence of Mr. Dudley's consciousness of guilt. Additionally, the threat testimony

was admitted in Guerrero with a limiting instruction to the jury immediately after the testimony and during final jury instructions. Id. at 787. In the present case, the trial court refused to give any jury instruction to limit the impact of Pointer's threat testimony.

The final case cited by the State on the probative value of threat evidence, United States v. Qamar, 671 F.2d 732 (2d Cir. 1982), is equally inapplicable to the present case. In Qamar, the Second Circuit affirmed the district court's admission of testimony detailing the defendant's threat to an associate when told that a shipment of hashish had been confiscated. Id. at 734, 736-37. The threat evidence again was clearly linked to the defendant. Id. at 734. Furthermore, the court admitted the evidence only with limiting instructions to the jury. Id. at 737. Finally, the Court in Qamar observed that the jury could not have been inflamed by the introduction of such evidence in light of the fact that the jury convicted the defendant on only one of three counts. Id. In the present case, Mr. Dudley was convicted and sentenced to a term of 50 years for a crime in which he was involved, if at all, on a peripheral basis.

As this review of the cases on which the State relies demonstrates, there is nothing inconsistent between the Seventh Circuit's decision and the prior decisions of this and other courts. Indeed, the decision is completely consistent with those prior decisions. In Qamar, for example, the Second Circuit held that in order to introduce evidence of threats, "the government must have an important purpose for the evidence in order to satisfy the Rule 403 balancing test." 671 F.2d at 736. In Guerrero, the Third Circuit held that in analyzing the balance of prejudice against the probative value of threat evidence, the court should look to such factors as "the importance and centrality